

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GEORGE BELCH, an individual,)
)
)
Plaintiff,)
vs.)
)
)
LAS VEGAS METROPOLITAN POLICE)
DEPARTMENT, et al.,)
)
Defendants.)
)
Case No.: 2:10-CV-00201-GMN-VCF
ORDER

Before the Court is the Motion for Summary Judgment (MSJ, ECF No. 42) filed by Defendants Las Vegas Metropolitan Police Department, and Officers J. Melton, M. Thiele, J. Zinger, K. Geiger, and S. Keith (collectively, “Defendants”). Plaintiff George Belch filed a Response (ECF No. 59) after a substitution of counsel (ECF Nos. 53-55), and Defendants filed a Reply (ECF No. 62).

I. BACKGROUND

Plaintiff sued Defendants in this Court on eight causes of action: (1) Violation of Civil Rights to Life and Security of Person, 42 U.S.C. § 1983; (2) Violation of Plaintiff's Civil Rights – Municipal Liability, 42 U.S.C. § 1983; (3) Negligence; (4) Negligent Training and Supervision; (5) Battery; (6) False Imprisonment; (7) Intentional Infliction of Emotional Distress; and (8) Negligent Infliction of Emotional Distress. (Compl., ECF No. 1.) The Court dismissed Plaintiff's claim of Negligent Training and Supervision (ECF No. 18), and all claims against Officer Keith (ECF No. 40)¹, and denied Plaintiff's motion to add Officer Hopson as a defendant. (Order, ECF No. 68.)

¹ On September 15, 2011, Defendant stipulated to dismiss Defendant Officer S. Keith with prejudice, and the Court so ordered. (ECF Nos. 39, 40.)

1 Unless otherwise indicated, the following undisputed facts are taken from excerpts of the
2 depositions of Plaintiff, his daughter Raenna Belch, Officer Thiele, Officer Zinger, Officer
3 Geiger, and Officer Melton. (George Belch Dep. Vol. 1-2, Exs. A, N to MSJ; Raenna Belch
4 Dep., Ex. B to MSJ; Thiele Dep., Ex. I to MSJ; Zinger Dep., Ex. J to MSJ; Geiger Dep., Ex. K
5 to MSJ; Melton Dep., Ex. L to MSJ.)

6 On the night of March 10, 2008, Plaintiff's daughter, Raenna, called him at work and
7 told him that her mother's boyfriend, Michael Petitta, had struck her in the eye at her mother's
8 house and that she had a black eye. (George Belch Dep., Vol. 1, 140:8-11, 145:9-10.) Raenna's
9 mother, Angelina Belch, was still married to Plaintiff but they were separated at the time and
10 not living together. (*Id.* at 116-117.) Annie Belch made payments on the house but it was still
11 listed in Plaintiff's name. (*Id.*) Raenna did not live at the house and did not have a key, but was
12 dating Richard Dorsey, who rented a room from Angelina. (Raenna Belch Dep., 39-40.)

13 According to Raenna, earlier in the night she had been verbally fighting with her
14 boyfriend in his room, when Angelina came in to interrupt. (*Id.* at 43-44.) Then, Raenna and
15 Angelina began fighting and when it escalated to physical fighting, Petitta physically joined the
16 fight as well, grabbing both Raenna and Angelina in headlocks. (*Id.* at 44.) At that time,
17 Raenna alleges that Petitta hit her in the eye, and then held her while Angelina hit her in the
18 face. (*Id.* at 44, 47-49.) Dorsey then held a pocket knife to his own neck to stop the fighting,
19 and Petitta wrestled him to the floor. (*Id.* at 44, 49.) Raenna and Dorsey then left the house
20 after Angelina threatened to call the police. (*Id.* at 44, 51.)

21 Raenna called Plaintiff from a park near the house, where she waited with Dorsey. (*Id.* at
22 52-53.) Plaintiff told Raenna to stay at the park until he finished work and could come get her.
23 (George Belch Dep., Vol. 1, 140:12-17.) Plaintiff did not call the police at that point, and did
24 not tell Raenna to call the police. (*Id.* at 140-141.)

25 Plaintiff left work around 12:30 a.m. and decided to go to the house before calling

1 Raenna or anyone else. (*Id.* at 148.) Raenna and Dorsey walked back to the house a few
2 minutes before Plaintiff arrived and were waiting nearby on the side of the house. (Raenna
3 Belch Dep., 58.) When Plaintiff arrived, he parked across the street from the house and
4 knocked on the front door. (*Id.* at 72; George Belch Dep., Vol. 1, 149.) Angelina opened the
5 door and Plaintiff told her that Petitta had to leave the house. (*Id.*) After disputing Raenna's
6 version of the night's events, Angelina then locked and closed the door and went back in the
7 house, still talking to Plaintiff through the window. (*Id.*) Plaintiff stated that he told Angelina
8 that "this is the second time Mike [Petitta] has his hands on my daughter. I need him to go
9 ahead and get his stuff and leave the premises." (George Belch Dep., Vol. 1, 152:7-8.)

10 At that point, Raenna came out from the side of the house and offered to use Dorsey's
11 key to get into the house, and Raenna eventually broke open the door to get in. (George Belch
12 Dep., Vol. 1, 161; Raenna Belch Dep., 72-74.) Raenna, Dorsey, and Plaintiff then entered the
13 house to confront Petitta and Angelina. (Raenna Belch Dep., 74; George Belch Dep., Vol. 1,
14 161.) When they entered, Petitta was holding up a cell phone and indicated that he was calling
15 the police. (*Id.*)

16 Officer Melton explained in his deposition that when he received the police dispatcher's
17 radio broadcast the computer terminal inside the police car also provided continuous live
18 updates. (Melton Dep., 35:16-24.) According to the Incident Recall for the event, at
19 approximately 1:42 a.m., the 911 call was initiated indicating that the ex-husband of the caller's
20 fiancé was trying to break into the house. (Ex. CC to Reply, ECF No. 62-1). The incident was
21 originally given Priority One status, but was changed to Priority Zero status when the operator
22 heard a female yelling and the caller indicated that the ex-husband had just broken into the
23 residence. (*Id.*) The officers were informed that a man fitting the description of Belch was
24 breaking into the home and that there was lots of yelling and arguing. (*Id.*) The caller (Pettita)
25 identified the Plaintiff as the intruder and identified him by name as George Belch. (*Id.*) The

1 caller reported that there were weapons in the house and that he was uncertain as to whether
2 Belch was armed. (*Id.*) Also, the caller reported that at least one person was potentially under
3 the influence of drugs and that there had been a previous incident at the house. (*Id.*) The caller
4 also indicated that he was a retired Officer from Pennsylvania. (*Id.*)

5 Plaintiff stated that he exited the house expecting that the police would come, and stood
6 on the sidewalk in front of the house. (George Belch Dep., Vol. 1, 193:14-17, 199:14-17.)
7 Around the time he noticed police at the end of the street, Raenna exited the house and handed
8 him her backpack. (*Id.* at 200:3-19.) She said that she was going to leave and asked Plaintiff to
9 put the backpack in his car. (*Id.* at 217:19-23; Raenna Belch Dep., 76:11-20.) Plaintiff stated
10 that he told her “No, you’re not. You’re going to stay here. You’re going to trust the police,
11 trust that they’re going to do the right thing.” (George Belch Dep., Vol. 1, 217:19-23.) Raenna
12 stated that he told her, “No, just wait here, and trust and believe that the police are here to serve
13 and protect you, they’ll do what’s right.” (Raenna Belch Dep., 76:17-19.) At that point,
14 Plaintiff and Raenna noticed Officer Geiger’s car approaching. (*Id.* at 76:20-22; George Belch
15 Dep., Vol. 1, 218:4-11.)

16 The remainder of the events that night are in dispute. Officer Melton stated that he was
17 among the first three to arrive on the scene, followed by Officer Beaumont Hopson who parked
18 behind him. (Melton Dep., 38:14-25, 44:21-22.) He stated that when he first arrived on the
19 scene, Officer Geiger, a female officer, was already present and standing in the middle of the
20 street. (*Id.* at 42, 15-18.) In a notarized affidavit submitted to the Court, Officer Hopson stated
21 that he believed Officer Melton was directly behind him as he approached the house, and that
22 they stopped approximately eight houses away. (Hopson Aff., Ex. BB to MSJ.) Officer Hopson
23 stated that Officer Geiger arrived around the time that he and Officer Melton exited their
24 vehicles. (*Id.*) Officer Geiger stated that she responded to the call that came over the radio in
25 her patrol car and when she arrived, she saw two other police cars but no other Officers.
(Geiger Dep., 18-19.)

1 As Officer Geiger was slowly driving up to the scene, she heard Plaintiff call to her
2 through her open window and then she parked the patrol car, got out and approached Plaintiff.
3 (Geiger Dep., 24, 26.) She believed Plaintiff said “[s]omething about he needed us over there,”
4 and that she then asked him to come over to her. (*Id.* at 26:19-23, 27:3.) Plaintiff stated that at
5 first he saw Officer Geiger drive past the house, park and then step out of the car, but that she
6 got back in the car and did two U-turns to get back to him after he said “hey” and waved her
7 back, saying “Hey, it’s back here. Come on back. You’re at the wrong place. Everything’s
8 okay.” (George Belch Dep., Vol. 1, 218:14-22.)

9 Officer Geiger stated that she and Plaintiff “had the street between us” at the time, and
10 that she was stationary. (Geiger Dep., 27:6, 8, 23.) She stated that Plaintiff responded, but that
11 she didn’t remember Plaintiff’s exact response, and that he didn’t listen to her and walked
12 towards his car. (*Id.* at 30:8-11.) Plaintiff stated that he was walking to his car already by the
13 time Officer Geiger got out of her car the second time, and that he had already passed her and
14 was opening his car door when she said “Sir, what’s in your hand?” (George Belch Dep., Vol.
15 1, 223:15-20.) Plaintiff stated that he placed the backpack in the car and showed her his hands
16 as he told her, “It’s my daughter’s backpack. I’m placing it in my car.” (*Id.* at 223:21-23,
17 225:18-23.)

18 Raenna stated that she heard Officer Geiger ask Plaintiff, “Sir, what do you have in your
19 hand?” and that Plaintiff responded, “I just have my daughter’s backpack. I’m just going to put
20 it in the car.” (Raenna Belch Dep., 80:8-11.) Raenna stated that at this time Officer Geiger
21 began to act “weird” and “strange” as demonstrated by her physical demeanor but did not
22 communicate anything else, and that Plaintiff stated, “There’s nothing to worry about, I’m just
23 putting my daughter’s backpack in the car. You have nothing to be scared of. There’s nothing
24 to worry about.” (Raenna Belch Dep., 79:6-17.)

25 Officer Geiger stated that she asked Plaintiff to show her his hands, and that he didn’t

1 comply, saying instead, “Give me a second, give me a second.” (Geiger Dep., 31:9-18.)
2 Officer Geiger stated that Plaintiff’s answer was “fairly angry” and that as he said it he was
3 walking towards his car carrying a backpack. (*Id.* at 18-25.) She said that Plaintiff opened the
4 door to his car, put the backpack in and then turned around towards her. (*Id.* at 32:7-10.) At
5 this point, Officer Geiger stated that she could not see Plaintiff’s hands and that the lighting
6 was dim. (*Id.* at 32:16-24.) Finally, after she “raised [her] voice enough to where [she] wanted
7 to see his hands to make sure he didn’t have weapons,” Officers Hopson and Melton “came up
8 from [her] left and took [Plaintiff] into custody.” (*Id.* at 35:1-5, 8, 18.)

9 According to Officer Melton and Officer Hopson, they came upon the scene and saw
10 this exchange but could not hear the conversation. (Melton Dep., 46:11-18; Hopson Aff., 2:¶¶6-
11 7.) Officer Melton stated that he saw Officer Geiger pointing at Plaintiff and shouting. (Melton
12 Dep., 48:6-7, 24.) Officer Melton stated that he did not see Plaintiff with any weapon and he
13 was not in any kind of aggressive posture. (*Id.* at 49:8-13.) Officer Hopson recalls hearing
14 Plaintiff state, “Don’t be afraid, I am not going to hurt you” as Plaintiff turned away from his
15 car toward Officer Geiger. (Hopson Aff., 2:¶7.) He recalls that Officer Melton began to issue
16 verbal commands to Plaintiff as they neared twenty-five feet from Plaintiff, including a
17 command to get on the ground, which was repeated at least three times in a loud command
18 voice. (*Id.* at 8.) Officer Melton stated that he started issuing commands around twenty feet
19 from Plaintiff, telling him to get on the ground very loudly. (Melton Dep., 50:24-25-51:1,
20 52:11-21.) Officer Melton stated that he repeated the command to get on the ground “more
21 than ten, probably less than 25” times. (*Id.* at 53:1-14.)

22 Raenna stated that she witnessed Plaintiff trying to talk to the Officers, saying “This is
23 my house” and “My daughter got hit in the eye.” (Raenna Belch Dep., 84:15-20.) She stated
24 that she heard Officer Melton yelling at Plaintiff to get on the ground about three times, and
25 Plaintiff replying “Why?” (*Id.* at 85:1-5, 90:9-13.) Officer Melton stated that while he was

1 commanding Plaintiff to get on the ground, Plaintiff “kept having his hands up over his
 2 shoulder like, What, what, what, what? I’m not doing anything, what? Waving his hands
 3 around” with his palms facing Officer Melton above his shoulders. (Melton Dep., 54:13-23.)

4 Raenna stated that she then saw Plaintiff “going to get on the ground” and “Officer
 5 Melton like lunged at him, like he went to go lunge over his head to like slam his head down, is
 6 what it looked like he was going to do.” (Raenna Belch Dep., 85:6-10.) She also explained that
 7 as a result, Plaintiff made a motion and then two other Officers came up, grabbed Plaintiff’s
 8 legs and “tried to like throw him down, or something, tried to like tackle him. And [Plaintiff]
 9 walked over to the – over to a driveway so that he could lay down and not ruin his nice dress
 10 pants.” (*Id.* at 85:10-18.) She stated that after Plaintiff “had laid down, Officer Melton ran over
 11 there and there was two or three officers on [Plaintiff]. And as he was laying down calmly, they
 12 were all being crazy. And he had one cuff [] in a handcuff, and Officer Melton was by his
 13 head...” (*Id.* at 85:20-24.) This deposition excerpt ends before Raenna’s statement concludes,
 14 however in another excerpt provided to the court, she stated, “And Officer Melton had struck
 15 [Plaintiff] in the back of the... [end of deposition excerpt].” (*Id.* at 85:24-25.) Raenna stated
 16 that she saw Plaintiff with his hands up, palms showing, and his body low to the ground
 17 because he was going to get down. (*Id.* at 89:13-22–90:1-5.) She stated that Plaintiff got on the
 18 ground voluntarily as Officer Melton approached him. (*Id.* at 90:14-25.)

19 In Plaintiff’s own deposition, he stated that at this point he looked to the ground, bent at
 20 his waist, and then looked back up at Officer Melton. (George Belch Dep., Vol. 2, 9-18.) When
 21 Plaintiff “looked back down to exactly see what spot [he was] getting down on,” Plaintiff stated
 22 that Officer Melton “lunges forward with his hands and snaps me – my neck from the back of
 23 my head, tries snapping me down to the ground face first.” (*Id.* at 267:9-13.)

24 Officer Melton stated that because Plaintiff kept “flailing his arms around,” he “went to
 25 grab one of [Plaintiff’s] arms and his shoulder to pull him to the ground” and that Plaintiff

1 “broke loose.” (Melton Dep., 55:4-7.) Officer Melton stated that he “continued to reengage
2 [Plaintiff] by trying to grab his arm or his shoulder area and push him onto the ground, and he
3 kept fighting me with that, and I kept asking him to stop and stop resisting and get onto the
4 ground.” (*Id.* at 55:7-11.) Officer Melton recalled that Plaintiff “kept yelling, Why, why, why?
5 I didn’t do anything.” (*Id.* at 55:11-12.) Officer Melton stated that it “went on for several
6 minutes” and that Plaintiff “was not violent toward [him]” and “not showing any behavior that
7 showed me that he wanted to hurt me. No punches, kicks, no bites, no spitting, just a lot of
8 verbal disagreement of why am I here to tell him to get onto the ground type of thing.” (*Id.* at
9 55:13-18.) Officer Melton stated that Plaintiff was a “big guy” and “kept breaking away from
10 me.” (*Id.* at 55:19-20.)

11 At one point, Officer Melton stated that Officer Hopson “started to back off” and said,
12 “I’ll tase him,” but that he “called that off” saying “No, not necessary. Just help me push him
13 down on the ground.” (*Id.* at 56:11-15.) Officer Melton stated:

14 And to me, the Taser would have been an appropriate use of force at that
15 point, the pepper spray would have been. The baton would have been. I
16 felt like I did not need those options. I’ve seen this before. I didn’t feel
threatened.

17 (*Id.* at 56:18-22.) Raenna Belch and Officer Geiger, stated that they saw a red laser or Taser
18 pointed at Plaintiff during the struggle, and Officer Hopson stated that he pulled his Taser as
19 well as another officer in the area. (Raenna Belch Dep., 97:13-15; Geiger Dep., 44:15-25–45:1-
20 19; Hopson Aff., 3:¶12.)

21 The entire deposition of Plaintiff is not included in the evidence submitted to the Court
22 by Defendants, and Plaintiff did not submit any portions of his deposition to support his
23 Response. However, Defendants did submit a “Statement of George Belch Regarding Events
24 on 3/10/2008” along with their motion, described as “Original of Statement Given Internal
25 Investigations” in handwriting at the top. (Ex. M to MSJ.) In that statement, Plaintiff adds

1 numerous details to the deposition excerpts supplied by Defendants, including this version of
2 the events:

3 While standing on the crown of the middle of the street when Officer Melton
4 came into clear view at 40 feet, Officer Melton moved to the middle of the street
5 and began his march toward me showing anger, aggression and hostility. I did
6 not move in any way standing still and holding my hands in clear sight with my
7 palms to the sky. At 10 feet Officer Melton stated for me to get to the ground. I
8 asked why while keeping my palms to the sky. He did not slow in his march and
9 at 5 feet he again stated get to the ground. I asked why again and was clearly
10 giving him my hands in surrender with my palms still to the sky. At this point he
11 was standing an arms length away and demanded me to get down to the ground
12 now! With all the ingredients that I earlier stated he was showing and I would to
13 add his closed mindedness and disrespect. I looked to the ground and looked
14 back up at him and he jumped toward at me, grabbing me behind my head in an
15 attempt to snap me down toward the ground. In self-defense I pushed him off of
16 me. Two other officers attempted to tackle me to the ground creating a
17 momentum to the left (south) of where I was originally standing. I felt one
18 officer slide all the way off of my body and knew at this point I must stop their
19 momentum in which we traveled 6 or 7 steps, keeping the officer connect to me,
20 at this point he was down around my knees. I let myself down to the ground and
21 was careful to not harm or kick the connected officer in any way. While down on
22 the ground in a complete submission position with my left hand behind my back
23 awaiting to begin the hand cuff process, the officer that was the last to be
24 connected began to hand cuff my left wrist and failed his first attempt pinching
25 my skin. He then repositioned his handcuffs and was successful in securing my
left wrist. In a split second after this I felt a very violent impact to the back of my
neck from a hard blunt object that was followed by him placing his forearm on
the back of my head in an attempt to humiliate me by pushing my face into the
concrete. I responded by not allowing my face to hit the concrete and that it was
uncalled for and turned to my right to find a red laser roaming my mid section
area (stomach). I turned to the ground immediately. An officer stated quit
resisting and I asked how in the f... am I resisting when I gave you my hand to
cuff. At this point I gave my right hand and it was cuffed. I was rolled over and
helped to my feet.

23 (Ex. M to MSJ.)

24 Officer Zinger stated that he arrived while Plaintiff was face down on the ground and
25 being handcuffed. (Zinger Dep., 20:5-6.) Eventually, Officer Melton and another officer

1 helped Plaintiff to his feet after he was handcuffed. (Melton Dep., 76:18-21.) Officer Thiele
2 arrived after Plaintiff was handcuffed and sitting on the curbside. (Thiele Dep., 24:17-19, 25:1-
3.) Officer Thiele also stated that he believed he was “the second one to arrive” and that
4 Officer “Hobson” arrived after him. (*Id.* at 25:17-25–26:1.)

5 Plaintiff indicated in his September 8, 2011, deposition that no one ever used a “Taser”
6 on him. (George Belch Dep., Vol. 2, 336:14-16.) Raenna Belch stated the same. (Raenna Belch
7 Dep., 97:19-21.) Plaintiff stated that he noticed contusions on the back of his neck the
8 following day. (George Belch Dep., Vol. 2, 336:17-19.) Photos taken of Plaintiff do not reveal
9 obvious injuries. (*See* Photographs, Ex. O to MSJ.) Plaintiff was never arrested or charged and
10 alleges that Defendants improperly took the word of Petitta without first investigating the
11 incident and used excessive force in restraining Plaintiff. (Compl. at ¶¶ 46–47; Melton Dep.,
12 89:12-16.)

13 **II. LEGAL STANDARD**

14 The Federal Rules of Civil Procedure provide for summary adjudication when the
15 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
16 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
17 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
18 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
19 (1986). Factual disputes whose resolution would not affect the outcome of the suit are
20 irrelevant to the consideration of a motion for summary judgment. *Id.* A dispute as to a material
21 fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the
22 nonmoving party. *See id.* “Summary judgment is inappropriate if reasonable jurors, drawing all
23 inferences in favor of the nonmoving party, could return a verdict in the nonmoving party’s
24 favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United*
25 *States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary

1 judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*,
2 477 U.S. 317, 323–24 (1986).

3 In determining summary judgment, a court applies a burden-shifting analysis. “When
4 the party moving for summary judgment would bear the burden of proof at trial, it must come
5 forward with evidence which would entitle it to a directed verdict if the evidence went
6 uncontested at trial. In such a case, the moving party has the initial burden of establishing
7 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
8 *Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and
9 quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving
10 the claim or defense, the moving party can meet its burden in two ways: (1) by presenting
11 evidence to negate an essential element of the nonmoving party’s case; or (2) by demonstrating
12 that the nonmoving party failed to make a showing sufficient to establish an element essential
13 to that party’s case on which that party will bear the burden of proof at trial. *See Celotex Corp.*,
14 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment
15 must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v.*
16 *S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

17 **III. DISCUSSION**

18 Here, in order to meet their burden, Defendants must either present evidence to negate
19 an essential element of Plaintiff’s case, or demonstrate that Plaintiff’s showing was insufficient
20 to establish an essential element of his case.

21 Plaintiff’s first two claims arise under 42 U.S.C. § 1983: (1) Violation of Civil Rights to
22 Life and Security of Person; and (2) Violation of Plaintiff’s Civil Rights – Municipal Liability.
23 Under the first claim, Plaintiff alleges four constitutional violations that have not been
24

25 ////

1 dismissed by the Court²:

- 2 a. Deprivation of liberty without due process of law – Fourteenth Amendment;
 3 b. Denial of equal protection of the laws – Fourteenth Amendment;
 4 c. Use of excessive force by law enforcement officers – Fourth Amendment; and
 4 d. Freedom from pre-conviction punishment – Fourteenth Amendment.

5 (See Compl., 8-9:¶52, ECF No. 1; Order, March 21, 2011, ECF No. 18.)

6 Plaintiff's remaining five claims arise under state law: (1) Negligence; (2) Battery; (3)
 7 False Imprisonment; (4) Intentional Infliction of Emotional Distress (“IIED”); and (5)
 8 Negligent Infliction of Emotional Distress (“NIED”).

9 **A. Section 1983 Claims**

10 **1. Constitutional Violations**

11 **a. *Fourth Amendment - Excessive Force***

12 “In evaluating a Fourth Amendment claim of excessive force, courts ask whether the
 13 officers’ actions are objectively reasonable in light of the facts and circumstances confronting
 14 them.” *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011) (quotation marks
 15 omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). “The calculus of
 16 reasonableness must embody allowance for the fact that police officers are often forced to make
 17 split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving –
 18 about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 396-
 19 97. “[W]e must balance the extent of the intrusion on the individual’s Fourth Amendment
 20 rights against the government’s interests to determine whether the officer’s conduct was
 21 objectively reasonable based on the totality of the circumstances.” *Espinosa v. City and County*
 22 *of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (citing *Graham*, 490 at 396-97).

24 ² In the Court’s March 21, 2011, Order, the Court held that “Plaintiff’s allegation of excessive force will be
 25 analyzed under the lens of the Fourth Amendment, rather than substantive due process, but his remaining
 Constitutional claims will be analyzed under the applicable provisions of the Fourteenth Amendment.” (Order,
 9:16-19, ECF No. 18.)

1 This analysis involves three steps. “First, we must assess the severity of the intrusion on
2 the individual’s Fourth Amendment rights by evaluating the type and amount of force
3 inflicted.” *Id.* (quotation marks omitted). “Next, we must evaluate the government’s interests
4 by assessing (1) the severity of the crime; (2) whether the suspect posed an immediate threat to
5 the officers’ or public’s safety; and (3) whether the suspect was resisting arrest or attempting to
6 escape.” *Id.* “Third, we balance the gravity of the intrusion on the individual against the
7 government’s need for that intrusion.” *Id.* (quotation marks omitted). “[I]n police misconduct
8 cases, summary judgment should only be granted sparingly because such cases often turn on
9 credibility determinations by a jury.” *Id.*

10 *(1) Type and amount of force inflicted*

11 Viewing the facts in the light most favorable to Plaintiff, up to three officers “tackled”
12 Plaintiff to the ground without provocation from him, and after he had indicated compliance
13 with the officers’ commands. Raenna stated that she saw Plaintiff lowering himself to the
14 ground voluntarily before Officer Melton lunged at him and two other officers tried to tackle
15 him. At some point there were multiple blows to his neck and shoulders, as well as use of force
16 by more than one officer to wrestle and push Plaintiff’s head and body to the ground and to
17 grab his arms in position for handcuffing. Plaintiff stated that he noticed contusions on the
18 back of his neck the following day. Although Plaintiff does not maintain that a Taser was used
19 on him, all parties appear to agree that a Taser was drawn and pointed; its use was
20 contemplated.

21 Plaintiff submitted medical records to show the extent of the harm caused by the
22 incident, including a February 2010 Psychiatric Evaluation in which he presented with anxiety
23 symptoms in response to paranoid thoughts and was diagnosed with a psychotic disorder,
24 alcohol abuse, hypertension and other chronic pain (Ex. 2 to Reply, ECF No. 59). Plaintiff also
25 submitted a Radiology Report (Ex. 3 to Reply, ECF No. 59) from November 2008, in which he

presented with right shoulder pain. Plaintiff also submitted employment termination records to show hardship as a result of the incident. (*See* Ex. 4 to Reply, ECF No. 59.) Defendants submitted medical records of Plaintiff in which evaluating physicians discussed Plaintiff's symptoms and diagnoses, including cervical strain and possibly shoulder soft tissue strain. (*See* Exs. U, V to MSJ.) Defendants also submitted color photographs of Plaintiff and his wrists, taken sometime after handcuffs were removed. (Ex. O to MSJ; Notice of Manual Filing, Ex. O, ECF No. 43.)

Accordingly, the Court finds that a reasonable jury could conclude that the type and amount of force inflicted was substantial.

(2) Governmental Interest

To evaluate the governmental interest, the Court assesses, from the Officers' perspective, the severity of Plaintiff's crime, whether Plaintiff posed an immediate threat to the officers' or public's safety, and whether Plaintiff was resisting or attempting to escape.

Here, the officers initially had at least some interest in detaining Plaintiff based on the facts provided to them from the police radio dispatcher as to the severity of the crime: home intrusion. First, the officers were responding to a Priority Zero reported forced entry of a residence and domestic violence call. The 911 caller reported that at least one person was under the influence of drugs and it was unclear as to whether Plaintiff was armed. The Officers had an interest in controlling the potentially violent situation.

However, upon arrival and interaction with Plaintiff, and drawing all inferences in favor of Plaintiff, the Officers later had little reason to believe that Plaintiff had any weapons. Officer Melton stated that Plaintiff was not in any kind of aggressive posture, that Plaintiff was not violent and did not show any behavior indicating that he wanted to hurt him. Officer Melton also specified that there were no punches, kicks, bites, or spitting on the part of Plaintiff, just verbal disagreement.

As to the second assessment of immediacy of threat, this factor is neutral at best.

Although Plaintiff was identified as a potentially dangerous suspect and he did not immediately obey Officer Melton's initial command to get down on the ground, Plaintiff's hands were turned toward the sky indicating that he had no weapon in his hand. Therefore, objectively, officers could disagree as to whether Plaintiff was an immediate threat to officer or public safety.

Last, regarding Plaintiff’s resistance, viewing the facts in the light most favorable to Plaintiff, Plaintiff was not actively resistant. Plaintiff’s own statements confirm that he was at least initially non-compliant because he did not begin to get to the ground the first two times Officer Melton instructed him to do so. However, the Court finds that a reasonable juror could conclude that when Plaintiff “looked to the ground and looked back up” and began bending at the waist, despite only doing so after being instructed three times to “get to the ground,” he was complying or beginning to comply with officer directions. A reasonable juror could also find that offering his left hand to be cuffed was not active resistance even if he kept his right hand by his face. Accordingly, the Court finds that a reasonable jury could conclude that the government had some interest in using force to subdue Plaintiff, but not a strong interest.

(3) *Balancing the gravity of the intrusion against the government's interest*

On balance, there is a genuine issue of material fact as to whether the gravity of the Officers' actions was reasonable if Plaintiff was cooperating. A determination of the level of Plaintiff's cooperation would affect the outcome of the suit and is relevant to the consideration of a motion for summary judgment. For example, if a jury were to conclude that Plaintiff was fully cooperating at the time of the incident, any use of force could be unreasonable. Conversely, if a fact-finder were to determine that Plaintiff appeared to be resisting, then the amount of force used could be considered reasonable.

1 Reviewing the evidence, the Court concludes that a jury, drawing all factual inferences
2 in favor of Plaintiff, could reasonably choose to believe Plaintiff's testimony and evidence and
3 to disbelieve Defendants' testimony and evidence. Because the Court finds that a reasonable
4 jury could conclude that the type and amount of force inflicted was excessive when balanced
5 against the government's interest, and that therefore Defendants' use of force was not
6 objectively reasonable, summary judgment must be denied as to this claim.

7 **b. Fourteenth Amendment Rights**

8 In its prior Order, this Court had specifically held that Plaintiff's "claim for substantive
9 due process violations arising under the Fourteenth Amendment would be inappropriate where
10 the Fourth Amendment is applicable," and that "Plaintiff's allegation of pre-conviction
11 punishment may be analyzed under the substantive due process standard." (Order, 5:19-20,
12 6:13-14, ECF No. 18.) However, the Court allowed Plaintiff's "claims arising under the
13 Fourteenth Amendment for violations of procedural due process and equal protection" to the
14 extent that he might produce evidence supporting the claims. (*Id.* at 5:20-22.) Here, the Court
15 concludes that Plaintiff's evidence cannot support his due process or equal protection claims.

16 When there is necessity for quick action or it is impractical to provide pre-deprivation
17 process, then a post-deprivation state tort remedy for erroneous deprivation may satisfy
18 procedural due process. *Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (citing *Logan v.*
19 *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)). Here, Plaintiff's procedural due process
20 claims are adequately remedied by the availability of state tort law causes of action.

21 In response to Defendants' state tort remedy argument, Plaintiff recharacterizes the
22 Fourteenth Amendment right as substantive, rather than procedural. It is true that the Ninth
23 Circuit has held that where a plaintiff can make a valid a Fourteenth Amendment substantive
24 due process claim, the availability of state remedies is not a bar. *Wood v. Ostrander*, 879 F.2d
25 583, 587 (9th Cir. 1989). However, Plaintiff's reliance on *Wood* is misplaced. The

1 overwhelming weight of authority establishes that where a plaintiff bases a Fourteenth
2 Amendment substantive due process claim on excessive force facts, the proper remedy is
3 provided by the Fourth Amendment. *See id.*; *Graham*, 490 U.S. at 393.

4 Here, to support his allegation of a Fourteenth Amendment due process violation
5 premised on the officers' reckless or negligent disregard for his safety, Plaintiff repackages the
6 same excessive force facts argued in the Fourth Amendment excessive force section. Namely,
7 Plaintiff argues that he was recklessly or negligently struck in the back of his neck by the
8 officers. These acts, if true, would constitute a substantive due process claim, not a procedural
9 due process claim, and do not support a claim of violation of equal protection. Under *Graham*,
10 Plaintiff's reframing of the issues as a substantive due process claim based on excessive force
11 facts makes the Fourteenth Amendment claims fail as a matter of law. Accordingly, the Court
12 will grant summary judgment in Defendants' favor as to Plaintiff's claims for deprivation of
13 liberty without due process of law, equal protection of the laws, and the right to be free from
14 pre-conviction punishment.

15 **2. Municipality Liability**

16 Plaintiff argues that there is Municipal Liability because the "policy and customs" taught
17 in the police academy were the cause of the alleged excessive force constitutional violation. A
18 plaintiff may establish § 1983 municipal liability in one of three ways. *Gillette v. Delmore*, 979
19 F.2d 1342, 1346-47 (9th Cir. 1992). First, the plaintiff may prove that a "city employee
20 committed the alleged constitutional violation pursuant to a formal governmental policy." *Id.*
21 Second, the plaintiff may establish that "the individual who committed the constitutional tort
22 was an official with 'final policy-making authority' and that the challenged action itself thus
23 constituted an act of official governmental policy." *Id.* Third, the plaintiff may prove that "an
24 official with final policy-making authority ratified a subordinate's unconstitutional decision or
25 action and the basis for it." *Id.* Municipal liability is not contingent on the liability of

1 individual officers, but it is contingent on a violation of constitutional rights. *Scott v. Henrich*,
 2 39 F.3d 912, 916 (9th Cir. 1994).

3 Plaintiff relies on Officer Melton’s deposition testimony to support his claim that the
 4 officers subdued him pursuant to policy and customs taught in the police academy. Here, the
 5 Court finds that a reasonable jury, taking all inferences in favor of Plaintiff, could find that the
 6 officers’ techniques and actions were carried out pursuant to the training they received from the
 7 LVMPD. Accordingly, the Court will deny summary judgment as to this claim.

8 **B. State Law Claims**

9 **1. Negligence**

10 In a negligence action, the plaintiff must demonstrate: “(1) that the defendant had a duty
 11 to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3)
 12 that the breach was both the actual and proximate cause of the plaintiff’s injury; and (4) that the
 13 plaintiff was damaged.” *Joynt v. Cal. Hotel & Casino*, 835 P.2d 799, 801 (Nev. 1992). An
 14 officer’s breach of duty in a negligence claim is “analyzed under the reasonableness standard of
 15 the Fourth Amendment.” *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1164 (N.D. Cal.
 16 2009); *see also Luchtel v. Hagemann*, 623 F.3d 975, 984 (9th Cir. 2010). Thus, if an officer
 17 acted reasonably, there was no breach of duty. *Knapps*, 647 F.Supp.2d at 1164.

18 As discussed above, taking the facts in the light most favorable to the Plaintiff, there
 19 remain genuine issues of material fact as to the reasonableness of the officers’ actions and
 20 Plaintiff’s damages. A finding of reasonableness of the officers’ actions negates breach of duty
 21 and necessarily changes the outcome. Thus, the Court finds that summary judgment is
 22 improper as to this claim.

23 **2. Battery**

24 Battery is the “intentional offensive or harmful contact with another person without legal
 25 justification.” Restatement 2d § 18, 21 (1965). The standard for common-law battery by a

1 police officer mirrors the federal civil rights law standard: “Liability attaches at the point at
2 which the level of force used by a peace officer exceeds that which is objectively reasonable
3 under the circumstances.” *Ramirez v. City of Reno*, 925 F.Supp. 681, 691 (9th Cir. 1996).
4 “Police officers are privileged to use that amount of force which reasonably appears necessary,
5 and are liable for battery to the extent they use more force than is reasonably necessary.” *Id.*

6 As discussed above, the Court finds that, taking the facts in the light most favorable to
7 the Plaintiff, there remain genuine issues of material fact as to the reasonableness of the
8 officers’ actions. A finding of reasonableness of the officers’ actions makes the action lawful
9 and necessarily changes the outcome. Thus, the Court finds summary judgment is improper as
10 to this claim.

11 **3. False Imprisonment**

12 To establish false imprisonment, Plaintiff must show he was “restrained of his liberty
13 under the probable imminence of force without any legal cause or justification.” *Garton v. City*
14 *of Reno*, 720 P.2d 1227, 1229 (Nev. 1986). The Court looks to whether objectively, the
15 officers’ had reasonable suspicion that the Plaintiff “ha[d], or [wa]s about to have, committed a
16 crime.” *U.S. v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006). In such a case, reasonable
17 suspicion constitutes legal justification for the restraint. *Id.*

18 Here, Plaintiff does not claim that the officers kept him restrained any longer than
19 necessary to obtain information to conduct their investigation. Therefore, for the purposes of
20 this analysis, the Court only looks to the officers’ actions before Plaintiff was in custody.
21 Plaintiff argues that the officers did not have legal justification because any suspicion was
22 based on Officer Geiger’s failure to communicate causing the officers to misinterpret the
23 situation. The Court disagrees. Viewing the facts in the light most favorable to Plaintiff, and
24 assuming that where the parties disagree as to the facts, Plaintiff’s version of events is true,
25 there is no evidence that would permit a fact-finder to conclude that the officers acted

1 unreasonably pre-detention under the circumstances relayed to them by the police dispatcher
2 according to the information provided by the caller.

3 As stated above, based on the information available to the officers at the time, Plaintiff
4 was the identified suspect in a volatile domestic violence situation where drug use was alleged
5 and the presence of weapons was suspected and could not be ruled out. According to Plaintiff's
6 own statement, he never told the officers he was not involved in the altercation until after he
7 was restrained. In fact, Plaintiff's statements of "everything is ok" and "don't be scared" to
8 Officer Geiger did not communicate his lack of involvement in the conflict. The officers did
9 not, and could not have, known that Plaintiff was innocent at the time he was restrained. An
10 officer arriving on the scene could only know that Plaintiff was the suspect by the 911 caller.
11 Clearly, Plaintiff heard Officer Melton's command when he responded "Why?" to the direction
12 and Plaintiff did not immediately obey Officer Melton's command. Thus, even if Officer
13 Geiger utterly failed in communicating with Plaintiff and there was an incorrect inference of
14 Plaintiff's lack of cooperation, the officers still had reasonable suspicion based solely on the
15 matching description of Plaintiff as the suspect in the 911 call.

16 The Court rejects Plaintiff's argument that the officers' subjective state of mind is
17 relevant. In fact, the Court may only consider what an objectively reasonable officer would
18 consider to be reasonable suspicion. Therefore, Plaintiff fails to show there is a genuine issue
19 of material fact precluding summary judgment. Accordingly, the Court will grant summary
20 judgment in favor of Defendants as to this claim.

21 **4. Intentional Infliction of Emotional Distress**

22 Intentional Infliction of Emotion Distress requires an adequate showing of:
23 (1) intentional or reckless extreme and outrageous conduct, (2) the plaintiff's having suffered
24 severe or extreme emotional distress, and (3) actual or proximate causation. *Star v. Rabello*,
25 625 P.2d 90, 92 (Nev. 1981). The Court determines whether the defendant's conduct is

1 extreme and outrageous, but, “where reasonable people may differ, the jury determines whether
 2 the conduct was extreme and outrageous enough to result in liability.” *Norman v. Gen. Motors*
 3 *Corp.*, 628 F.Supp. 702, 704-05 (D. Nev. 1986) (considering “totality of the circumstances” in
 4 determining whether conduct is extreme and outrageous); Restatement (Second) of Torts § 46
 5 cmt. h.

6 “[E]xtreme and outrageous conduct is that which is outside all possible bounds of
 7 decency and is regarded as utterly intolerable in a civilized community.” *Maduike v. Agency*
 8 *Rent-A-Car*, 114 Nev. 1, 953 P.2d 24, 26 (Nev. 1998). Thus, by definition, reasonable behavior
 9 cannot be extreme or outrageous. *Id.*

10 Here, even drawing all inferences in favor of Plaintiff, the Court cannot find that a
 11 reasonable jury might conclude that the Officers’ actions constituted intentional or reckless
 12 extreme and outrageous conduct, outside all possible bounds of decency and regarded as utterly
 13 intolerable in a civilized community. Accordingly, the Court will grant summary judgment in
 14 favor of Defendants as to this claim.

15 **5. Negligent Infliction of Emotional Distress**

16 In Nevada, to prevail on a Negligent Infliction of Emotional Distress claim, the Plaintiff
 17 must prove: (1) Defendant owed a duty of care to the Plaintiff; (2) Defendant breached that
 18 duty; (3) The breach was the proximate cause of Plaintiff’s injuries; and (4) Plaintiff suffered
 19 serious emotional distress. *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000). Nevada
 20 recognizes both bystander and direct theories of a negligent infliction of emotional distress
 21 claim. *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995).

22 As discussed above, and taking the facts in the light most favorable to the Plaintiff, there
 23 remain genuine issues of material fact as to the reasonableness of the officers’ actions. The
 24 Court also finds that a reasonable jury could conclude that Plaintiff suffered serious emotional
 25 distress proximately caused by a breach of Defendants’ duty of care. Accordingly, the Court

finds summary judgment is not proper as to this claim.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF No. 42) is **GRANTED** in part, and **DENIED** in part, as follows:

Defendants' motion is **GRANTED** as to Plaintiff's Constitutional claims for violations of due process, equal protection and freedom from pre-conviction punishment, as well as to Plaintiff's claims for false imprisonment, and intentional infliction of emotional distress; and is **DENIED** as to Plaintiff's Constitutional claim under 42 U.S.C. § 1983 for excessive use of force as guaranteed by the Fourth Amendment, as well as to Plaintiff's claims for municipality liability, negligence, negligent infliction of emotional distress, and battery.

DATED this 30th day of September, 2012.


Gloria M. Navarro
United States District Judge